

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DENA PIPKIN, personally and as Personal  
Representative of the ESTATE OF JOSHUA  
HIGHTOWER; RICHARD HIGHTOWER,

Plaintiffs,

v.

THE BURLINGTON NORTHERN AND  
SANTA FE RAILROAD COMPANY, a  
foreign corporation; CREW SHUTTLE  
SERVICE, INC., a foreign corporation,

Defendants,

UNION PACIFIC RAILROAD COMPANY,

Intervenor.

Case No.C04-5591RJB

ORDER GRANTING MOTION  
FOR PROTECTIVE ORDER

This matter comes before the court on Intervenor Union Pacific's Motion for Protective Order (Dkt. 103), in which defendant BNSF joins (Dkt. 107). The court has reviewed all documents filed in support of and in opposition to this motion and the file herein.

**I. PROCEDURAL AND FACTUAL BACKGROUND**

According to the First Amended Complaint ("Complaint"), on September 4, 2003, eight year old Joshua Hightower died while playing with a friend at the Rocky Point Rail Yard. Dkt. 27, at 2-3. Rocky Point is owned and maintained by Burlington Northern and Santa Fe Railroad Company (BNSF). *Id.*

1 The plaintiffs sued BNSF under an attractive nuisance theory, later adding Crew for  
2 failure to warn Joshua of the danger. Dkt. 27. BNSF removed to this court based on diversity  
3 jurisdiction. Dkt. 1. Union Pacific moved to intervene (Dkt. 47), and the motion was granted  
4 (Dkt. 53).

5 The plaintiffs' Fourth Set of Requests for Production seek documents pertaining to a  
6 1909 Trackage Agreement governing BNSF's claim for indemnity in a concurrent arbitration  
7 proceeding:

8 **REQUEST FOR PRODUCTION A:** Please provide any document pertaining to the  
9 governing, interpretation, or understanding of the trackage indemnification agreement  
10 between BNSF and UP, including any documents or correspondence between BNSF and  
UP in cases prior, or similar, to the current incident, and any documents or  
correspondence where UP took a position similar to its position in the current case.

11 **REQUEST FOR PRODUCTION B:** Please provide any document pertaining to the  
12 governing, interpretation, or understanding of the trackage indemnification agreement  
13 between BNSF and UP in the current case, including but not limited to any documents or  
correspondence between BNSF and UP in the current case indicating or reflecting  
cooperation, agreement, or mutual understanding or application of the trackage  
indemnification agreement.

14 Dkt. 104, Exh. A at 4.

15 Counsel for Union Pacific objected to these requests. Dkt. 104, Exh. B. The parties  
16 conferred about the objections. After the conference, counsel for Union Pacific again contacted  
17 plaintiffs' counsel and asked that the discovery requests be withdrawn. Dkt. 104, Exh. C.  
18 Counsel for the plaintiffs did not withdraw the requests, and Union Pacific now moves for a  
19 protective order. Dkt. 103. BNSF joins in the motion. Dkt. 107.

## 20 II. DISCUSSION

21 Federal Rule 26 governs protective orders and provides the following:

22 Upon motion by a party . . . accompanied by a certification that the movant has in good  
23 faith conferred or attempted to confer with other affected parties in an effort to resolve  
24 the dispute without court action, and for good cause shown, the court in which the  
action is pending . . . may make any order which justice requires to protect a party or  
person from annoyance, embarrassment, oppression, or undue burden or expense.

25 Fed. R. Civ. P. 26(c).

26 Union Pacific contends that the request pertaining to its Trackage Agreement is not

1 relevant. Federal Rule 26(b) provides that litigants “may obtain discovery regarding any matter,  
2 not privileged, that is relevant to the claim or defense of any party.” Fed. R. Civ. P. 26(b). Union  
3 Pacific claims that the Trackage Agreement is relevant only to BNSF’s claim for indemnity as  
4 against Union Pacific. Dkt. 103 at 4. Union Pacific claims that because the jury will not be  
5 required to determine whether Union Pacific must indemnify BNSF, the Trackage Agreement is  
6 irrelevant to this lawsuit. The plaintiffs contend that this evidence is relevant in two respects.

7 First, the plaintiffs contend that Union Pacific’s intervention puts the meaning and  
8 interpretation of the Trackage Agreement at issue. This contention is premised upon the notion  
9 that this court will be required to apply the Trackage Agreement. *See, e.g.*, Dkt. 108 at 6  
10 (“Certainly the manner the parties have themselves interpreted this clause is highly relevant to  
11 how the words might properly be interpreted and applied by this court in this case.”). This case  
12 does not require the court to determine whether Union Pacific is required to indemnify BNSF.  
13 Therefore, information pertaining to the interpretation and application of the agreement is  
14 irrelevant and not discoverable under Federal Rule 26(b).

15 Second, the plaintiffs contend that the information it seeks will aid in determining how  
16 the jury should be instructed about causation and will aid the jury in determining causation. The  
17 plaintiffs contend that the jury should be instructed to determine whether a Union Pacific train  
18 was a cause, even if not the sole cause, of the accident. The plaintiffs contend that Union  
19 Pacific’s train may have been a cause of the accident even if the decedent was not actually struck  
20 by a Union Pacific train and seek to discover whether Union Pacific and BNSF have previously  
21 interpreted the Trackage Agreement to define causation as something less than injury resulting  
22 from contact with a train. How BNSF and Union Pacific interpret causation for purposes of the  
23 Trackage Agreement does not affect how legal causation should be defined for the jury. The  
24 court should therefore grant the motion for a protective order on the grounds that the  
25 information sought by Requests for Production A and B in Plaintiffs’ Fourth Set of Requests for  
26 Production is irrelevant to this case.

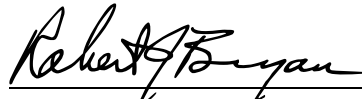
### III.ORDER

1 Therefore, it is now

2 **ORDERED** that Intervenor Union Pacific's Motion for Protective Order (Dkt. 103), in  
3 which defendant BNSF joins (Dkt. 107), is **GRANTED**; that discovery regarding the governing,  
4 interpretation, or understanding of the Trackage Agreement shall not be had; and that Union  
5 Pacific and BNSF shall not be required to respond to Plaintiffs' Fourth set of Requests for  
6 Production.

7 The Clerk of the Court is instructed to send uncertified copies of this Order to all  
8 counsel of record and to any party appearing *pro se* at said party's last known address.

9 DATED this 13<sup>th</sup> day of October, 2005.

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11 Robert J. Bryan  
12 United States District Judge  
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